IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 22, 2008

STATE OF TENNESSEE v. KESHAWN DARNELL LEE

Direct Appeal from the Circuit Court for Marshall County
No. 17287 Robert Criger, Judge

No. M2007-01271-CCA-R3-CD - Filed April 24, 2008

A Marshall County jury convicted the Defendant, Keshawn Darnell Lee, of two counts of sexual battery, two counts of assault, and one count of attempted rape. The trial court sentenced him to an effective sentence of five years of incarceration. On appeal, the Defendant raises two issues: (1) the evidence is insufficient to sustain his convictions; and (2) the sentence imposed is excessive. After a thorough review of the record and the applicable law, we affirm the trial court's judgments, but remand for the entry of modified judgments reflecting the merger of the count 2 conviction with count 1 and the merger of the count 4 conviction with count 3.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed and Remanded

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and JAMES CURWOOD WITT, JR., JJ., joined.

Michael J. Collins, Shelbyville, Tennessee, for the Appellant, Keshawn Darnell Lee.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Clarence E. Lutz, Assistant Attorney General; Chuck Crawford, District Attorney General; Weakley E. Barnard and Brooke Grubb, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A. Trial

A Marshall County Grand Jury indicted the Defendant on four counts of sexual battery and

one count of attempted rape. The following facts were presented at the Defendant's trial: S.A.,[1] testified that on August 3, 2006, she was fourteen years old. While her father was at work that day, she babysat her two younger brothers, ages ten and seven, and her neighbor's son, age ten. S.A. lived with her brothers, her father, and her father's girlfriend in Marshall County.

While the boys watched television and played in the yard, S.A. noticed the Defendant walking down the road in front of her house. She had seen him previously but had never really spoken with him. S.A. was inside the house with the boys when the Defendant knocked on the front door. Through the storm door, he asked if he could borrow her phone and phonebook. S.A. said that, by this point, the neighbor's son had told her the Defendant was twenty-one years old. S.A. retrieved the phone and phonebook and gave them to the Defendant, who then told her she "had a nice ass." When the Defendant finished making his calls, he joined S.A.'s brothers in the front yard and played with their go-carts. The Defendant also asked if he could swim in the backyard at S.A.'s house, but after both S.A.'s father and his girlfriend by phone denied him permission to swim, the Defendant left the house.

S.A. said she then locked the front door and was walking to the back door to lock it when the Defendant opened the back screen door. S.A. testified that the Defendant told her, "Older men aren't looking for relationships, they are looking for sex." At that point, the Defendant lifted S.A's shirt and bra with his hand, and he put his hand and mouth on her breast. S.A. said the Defendant never asked permission and he "forced [her] to do this." S.A. said she "started backing away" but ran into the laundry room door. S.A. testified that then "[the Defendant] unzipped his pants" and he "pulled [his penis] out himself." She said he used his hands to pull his penis out of his pants, and then the Defendant "grabbed [her] hand and made [her] touch it." S.A. stated that she told the Defendant she was only fourteen years old, and he told her his age, followed by the directions to "not tell because he would get in trouble." Then, the Defendant pushed S.A.'s head down towards his penis by grabbing her neck. S.A. said the Defendant ordered her to "suck [his] dick." S.A. testified that she locked her knees, and, after the Defendant could not force her head downwards, he "just g[a]ve[] up and le[ft]." S.A. added that the Defendant kissed her neck, and she did not scream for her little brothers because "they can't do anything." S.A. said she closed the door and soon her father's girlfriend, Jeannette Truelove, arrived home. S.A. told her what happened, and Truelove called the police and S.A.'s father.

On cross-examination, S.A. testified that the Defendant was initially on her porch about five minutes when he began making phone calls. She also said he had his hands on her for less than five minutes.

Jeanette Truelove, the victim's father's girlfriend, testified that she lived with S.A. and her family on August 3, 2006. While Truelove was at work, S.A. was babysitting her little brothers. Truelove said that, when she came home, "[she] could tell something [was] wrong." She described S.A. as looking "scared to death." S.A. initially told Truelove nothing was wrong, but then she

[1] For the privacy of the child victim, we will refer to her by her initials.

revealed what happened while crying. Truelove said S.A. never had a boyfriend, never went out, and boys never came over to the house. After Truelove understood what happened, she called the police and S.A.'s father.

Detective Bart Fagan of the Marshall County Sheriff's Office arrived at S.A.'s house with another officer after being dispatched on a reported sexual assault. S.A. told Detective Fagan what had happened, and then Detective Fagan found the Defendant. The Defendant willingly went to the police station, where he wrote a statement. Detective Fagan read the Defendant's statement to the court. In his statement, the Defendant said he went to S.A.'s house to use the phone. While at the house, he asked if he could swim in the pool, but was told that he could not. The Defendant said he and S.A. "were talking and she was looking at me suggestively, so I played upon it . . . just out of shock value, I unzipped my pants and pretended to expose myself, but I had my penis still out of my pee hole part of my briefs from urinating. So I accidentally exposed myself more than I intended." The Defendant also admitted to kissing S.A.'s neck. On cross-examination, Detective Fagan clarified that the Defendant, in his statement, did not admit to trying to rape S.A. or touch her breast.

The Defendant testified that on August 3, 2006, he was on the street trying to find someone's phone to use. He approached S.A.'s house and asked for a phone and phonebook, which S.A. brought to him. He testified that, while he was on hold, he asked S.A. if she had a boyfriend, and she said "yes." The Defendant said that, after he used the phone, he played with the boys on the go-carts and tried getting permission to swim in the pool. The Defendant said eventually he and S.A. were sitting and talking, and he began asking her "sexual questions." He said, "I started talking [to] her and everything. I g[o]t closer to her. She [wa]s not letting me know she [wa]s uncomfortable or anything . . . . She didn't even frown at me." The Defendant said he then began "saying sexual things to her . . . about her boyfriend." The Defendant admitted he did not think she was eighteen years old but did not think she was as young as fourteen years old. He testified that S.A. was smiling and looking at him; he asked her to lift her shirt, at which point, she raised her shirt and bra. In his words, "so [he] decided to touch it," referring to her breast. He said after that, she talked on the phone. While she was on the phone, he asked her if his presence was acceptable, to which she shrugged her shoulders. The Defendant said he then unzipped his pants while she was on the phone. "She looked down and she kind of – she giggled a little bit." The Defendant said he looked down and saw his penis was exposed. He said he was "embarrassed," so "to save face" he "guided her hand to . . . [his] penis." He said, "She had no kind of resistance whatsoever." He stated that he then put her hand on his groin, and, "She never told [him] no. She didn't even frown at [him] the whole time." The Defendant said S.A. then squeezed his penis, at which point, he zipped his pants closed and talked to her about oral sex. He said she said "maybe" she would perform oral sex on him. He said the phone rang, so he hugged her, kissed her neck, and left the house. He testified that two to three hours later the police took him to the station.

On cross-examination, the Defendant attributed any inconsistencies or omissions in his written statement he gave at the police station to nervousness. The Defendant also read the letter he wrote to S.A.'s father, wherein he asked for forgiveness. After testifying about the letter, the Defendant said the incident with S.A. happened outside of the house under the awning, and S.A.

"wasn't acting like a little girl." He said she was "making looks with her face and stuff like that . . . you know like a female would." When asked if he felt the metal zipper of his jeans against his exposed penis, he said he did not, and reiterated that he did not mean "to show [his] flesh." The Defendant admitted to putting his mouth to S.A.'s breast and telling her that older men wanted sex. He also admitted telling her that she "had a nice ass." The Defendant clarified that he did not outright ask, rather he hinted at asking, S.A. for oral sex.

The jury found the Defendant guilty of two counts of sexual battery, two counts of assault, and one count of attempted rape. It is from these convictions that the Defendant now appeals.

B. Sentencing Hearing

At the sentencing hearing, the following evidence was presented: Beth Flatt, a probation and parole officer for Marshall County, testified about the investigative report she prepared concerning the Defendant. The Defendant has two prior convictions, both in 2006: leaving the scene of an accident with property damage and driving without a license. The Defendant also admitted to using marijuana, cocaine, ecstasy, nitrous, painkillers, mushrooms, and LSD in the past. On cross-examination, Flatt testified that the Defendant never had any convictions for the drug possession. Also, she stated the Defendant was classified as a sexual offender with a 12% recidivism rate for the next five years.

The trial court then issued its findings. It found enhancement factor (1), that the Defendant has a record of past criminal behavior, and enhancement factor (4), that the victim was particularly vulnerable given her young age. The trial court emphasized that the Defendant's truthfulness about his long-term drug use does not earn him any "brownie points." The trial court also found, "I do accredit the testimony of the victim. I believe her. I do not believe the Defendant's denials. I accredit the jury's verdict." Additionally, the trial court stated, "[I]n making this decision, the Court is considering what [it] finds as the Defendant's poor chance for rehabilitation and amenability to corrections; the circumstances of the offense; his criminal record; his social history, which is poor." The trial court sentenced the Defendant to one year and six months for each count of the two counts of sexual battery, six months for each of the two counts for assault, and five years for the one count of attempted rape. The sentences are to be served concurrently. It is from this sentence that the Defendant now appeals.

II. Analysis

On appeal, the Defendant raises two issues: (1) the evidence is insufficient to sustain his convictions; and (2) the sentence imposed is excessive.

A. Sufficiency of the Evidence

The Defendant claims there was insufficient evidence to support the convictions for two counts of sexual battery, two counts of assault, and one count of attempted rape. The State argues

that the testimony of the victim, her mother, and the Defendant himself support the convictions.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see* Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

Sexual battery is defined as:

> unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances: (1) force or coercion is used to accomplish the act; [or] (2) the sexual contact is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the

contact that the victim did not consent.

T.C.A. § 39-13-505 (2006). "Sexual contact includes the intentional touching of the . . . defendant's . . . intimate parts, . . . if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." T.C.A. § 39-13-501 (7) (2006). The indictments for these two counts both cite that the Defendant forced the victim to touch his genital region with her hand. The victim and the Defendant both testified that the Defendant put the victim's hand on his penis after he talked about wanting sex. The Defendant added that he placed her hand on his groin region, as well. The victim stated that the Defendant grabbed her hand and forced her to touch his penis. These facts show that twice the Defendant forced the victim to touch his genital region without her consent in order to satisfy his sexual arousal. We conclude this evidence supports both convictions of sexual battery.

Assault is defined as "Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative." T.C.A. § 39-13-101(a)(3) (2006). The Defendant was convicted of two counts of assault, both for the touching of his hand to the victim's breast. The victim testified that the Defendant touched her breast when they were inside the house. She said he forced his hand up under her shirt and bra. The Defendant testified that he touched her breast outside of the house when she lifted her shirt for him. The touching of a woman's bare breast without her consent would be considered extremely offensive by a reasonable person. The Defendant intentionally and knowingly touched the victim's bare breast with his hands twice. We conclude this evidence supports both convictions of assault.

The crime of attempted rape combines several statutory definitions. Rape is defined as:

> [The] unlawful sexual penetration of a victim by the defendant or of the defendant by a victim accompanied by any of the following circumstances: (1) force or coercion is used to accomplish the act; (2) the sexual penetration is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the penetration that the victim did not consent.

T.C.A. § 39-13-503 (2006). Sexual penetration is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body." T.C.A. § 39-13-501 (2006). Criminal attempt is when:

> A person . . . acting with the kind of culpability otherwise required for the offense: (1) intentionally engages in action or causes a result that would constitute an offense, if the circumstances surrounding the conduct were as the person believes them to be; (2) acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or (3) acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the

offense.

T.C.A. § 39-12-101 (2006).

The State presented sufficient proof to support a conviction for attempted rape. The Defendant told S.A. to "suck [his] dick." He also unzipped his pants, and pulled his penis out of his pants, forcing S.A. to touch his penis with her hand. After that, he grabbed her neck and tried forcing her head downwards towards his penis. The Defendant's exposure of his penis and grabbing of the victim's neck are substantial steps towards the completion of forcing the victim to perform oral sex on him. Oral sex is included in the definition of sexual penetration. In addition to the victim's testimony that she did not consent, the victim's resistence by locking her knees and fighting to keep her head up are proof that such sexual penetration would have been done without her consent. We conclude these facts support a conviction of attempted rape.

The Defendant is not entitled to relief on his claims of insufficient evidence.

C. Sentencing

The Defendant lastly raises a claim that his sentence is excessive. When a defendant challenges the length, range or manner of service of a sentence, this Court must conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

In conducting a de novo review of a sentence, we must consider: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing, (4) the arguments of counsel relative to sentencing alternatives, (5) the nature and characteristics of the offense, (6) any mitigating or enhancement factors, (7) any statements made by the defendant on his or her own behalf and (8) the defendant's potential or lack of potential for rehabilitation or treatment. *See* T.C.A. § 40-35-210 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

The trial court found enhancement factors (1) and (4) and did not find any mitigating factors. Enhancement factor (1) says "The defendant has a previous history of criminal convictions or

criminal behavior, in addition to those necessary to establish the appropriate range. T.C.A. § 40-35-114 (1) (2006). The Defendant admitted his history of illegal drug use to the police. Listing the drugs he has used, he said:

> Marijuana -- First used at sixteen, used everyday until age twenty, quit because 'I started hearing voices and still do sometimes.'
> Cocaine (powder) -- First used at age seventeen, share grams, but not often, last used at age nineteen, quit because 'paranoid and heard voices/still do sometimes.'
> Ecstasy – first used at age twenty, used socially but not often, last used at age twenty, quit because 'coming down was real bad on me.'
> Nitrous – first used age twenty, used socially but not often, last used at age twenty-one, stated that he just 'quit.'
> Pain Killers (Xanax) – used very rarely at age twenty, quit because 'didn't interest me.'
> Mushrooms – first used at age nineteen, used rarely for a few months, just quit.
> LSD – used only once at age twenty-one and will never do it [any]more.

In addition to the Defendant's drug use, he has two prior convictions, both from 2006. He was convicted of leaving the scene of an accident involving property damage and driving without a license. These facts sufficiently support the trial court's finding that enhancement factor (1) is applicable.

Enhancement factor (4) says, "The victim of the offense was particularly vulnerable because of age or physical or mental disability." T.C.A. § 40-35-114 (2006). "The age of the victim, standing alone, does not justify application of the particular vulnerability enhancement factor." *State v. Blake Tallant*, No. E2006-02273-CCA-R3-CD, 2008 WL 115818, at *32 (Tenn. Crim. App. at Knoxville, Jan. 14, 2008), *no Tenn. R. App. P. 11 application filed*, citing *State v. Poole*, 945 S.W.2d 93, 96 (Tenn.1997). Instead, we should consider:

> (1) whether, because of age, the victim was particularly unable to resist the crime, summon help, or testify at a later date; (2) whether the victim's age (extremely young or old) is entitled to additional weight; and (3) whether the vulnerability of the victim made the victim more of a target for the offense or, conversely, whether the offense was committed in such a manner as to render the vulnerability of the victim irrelevant.

Id., citing State *v. Walton*, 958 S.W.2d 724, 728 (Tenn.1997); *Poole*, 945 S.W.2d at 96-97. The victim was fourteen years old, and the Defendant was twenty-one years old, seven years her senior. The victim even told him her age right before he forced her to touch his penis. Additionally, the Defendant knew the victim was home without an adult, so no one would be able to stop him or rescue her. Furthermore, he told her not to tell anyone about what he did because he knew it was wrong, given his actions and their ages. These facts show the Defendant targeted the victim for her vulnerability. The evidence sufficiently supports the trial court's finding of enhancement factor (4).

The Defendant argues for a reduction of his sentence based on the totality of the circumstances. We point out that the facts show the Defendant shoved his way into a house via the back door, where he knew a girl was home alone, babysitting her little brothers. He then pushed her against the door, so she could not escape, and he lifted her shirt and bra. He put his hand and mouth to her breast. Then, he exposed himself and forced her to touch his penis. He tried physically forcing her to perform oral sex on him. When he did not succeed, he left the house. These circumstances justify the five year sentence, which is also legally permissible. The Defendant is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the evidence and applicable law, we conclude that the evidence sufficiently supports the Defendant's convictions and the trial court appropriately sentenced the Defendant. However, because the record indicates that the trial court and the parties agreed that the conviction for count 2 must be merged with the conviction for count 1, and the conviction for count 4 must be merged with the conviction for count 3, we remand to the trial court for the entry of modified judgments reflecting these mergers. This will result in a total of three convictions for the Defendant rather than the five convictions that presently appear in the record. The merger of the convictions will have no effect on the Defendant's effective sentence of five years of incarceration.

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ROBERT W. WEDEMEYER, JUDGE